IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT MARTINSBURG

BANK OF CHARLES TOWN,

Plaintiff,

v.

CIVIL ACTION NO. 3:10-CV-00102-JPB
(Removed from the Circuit Court of
Jefferson County, No. 10-C-312)

ENCOMPASS INSURANCE,
ENCOMPASS INDEMNITY COMPANY,
MICHELLE GROSSMAN,
JOHN WILSON, and JOHN OR JANE DOE,

Defendants.

REPLY TO PLAINTIFF'S RESPONSE TO TWO DISMISSAL MOTIONS

Defendants Encompass Insurance Company (incorrectly named in *Complaint* as "Encompass Insurance"), Encompass Indemnity Company (Encompass Indemnity), and Michele Grossman (Grossman), by counsel, reply to *Plaintiff's Response in Opposition to the Encompass Defendants' Motions to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6)* (the Response), dkt. 16. The Response addresses both the substantive *Motion to Dismiss* of Encompass Indemnity, dkt. 7, and the procedural *Motion to Dismiss Encompass Insurance* of Encompass Insurance Company, dkt. 10.[1]

Plaintiff, Bank of Charles Town (Bank), asks the Court to "abstain from ruling on the Defendants' Motions to Dismiss" on the ground that this action must be remanded to the state court. Response at 2. In fact, the parties' diversity is undisputed, and Bank clearly seeks more than $75,000.

[1]See also Grossman's separate dismissal motion, as she is not a proper party to three (3) of the *Complaint*'s four (4) Counts.

See *Opposition to Motion to Remand*, filed contemporaneously herewith. The Court has jurisdiction.

The dismissal motions are ripe for consideration. Bank states no claim on which relief may be granted. Defendants ask the Court to dismiss this action, with prejudice. Fed. R. Civ. P. 12(b)(6).

DISCUSSION

A valid complaint must contain "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). Bank errs in stating that "'a motion to dismiss for failure to state a claim for relief should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim.'" Response at 7 (quoting *Johnson v. Mueller*, 415 F.2d 354 (4th Cir. 1969) (citing *Conley v. Gibson*, 355 U.S. 41 (1957))). *Twombly* abrogated *Conley*'s formula. *Twombly*, 550 U.S. at 556, text and n. 3.

Rather, the *Complaint* must show Bank's "'factual allegations that when assumed to be true "raise a right to relief above the speculative level."'" *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009) (citations omitted). The Court may consider attachments to the pleadings, if integral to the pleadings, and may take judicial notice of items of public record. *Sec'y of State For Def. v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007) (citations omitted).

Bank errs in stating that the Court "must resolve all doubts and inferences in [Bank's] favor ..." Response at 7 (citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 243-44 (4th Cir.1999)). The Court need not accept the *Complaint*'s legal conclusions or Bank's unwarranted inferences or arguments as true. *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008) (citations omitted).

The Court "focus[es] only on the legal sufficiency of" the *Complaint*; its Exhs. A, *Agreement* *for the Purchase and Sale of Improved Real Property with Preoccupancy Provision* dated October 10, 2008 (the Installment Contract), and B, the Declarations of Encompass Indemnity's homeowners policy (the Policy); and the public record confirming Bank's May 27, 2010, foreclosure on real property (the Home). *Id.*; *Trimble Navigation*, 484 F.3d at 705.[2] The Court need not consider Bank's unwarranted inferences or conclusions as to the Home's water damage, the Policy, and Defendants' relationships. *Giarratano*, 521 F.3d at 302. The *Complaint*, its integral attachments, and the public record show that Bank states no claim on which relief may be granted. Fed. R. Civ. P. 12(b)(6).

A. Bank states no substantive claim on which relief may be granted.

Encompass Indemnity's *Motion to Dismiss*, dkt. 7, addresses Bank's substantive claims for Policy coverage and damages under *Hayseeds, Inc. v. State Farm Fire and Cas.*, 352 S.E.2d 73 (W. Va. 1986), and the Unfair Trade Practices Act, W. Va. Code § 33-11-4(9) (the UTPA), and legislative rules. *Complaint*. Bank does not dispute that Policy coverage, if it existed at all, ended on May 27, 2010, when Bank foreclosed on the Home.

Bank alleged that the Palmers first discovered water damage on June 2, 2010, *Complaint* ¶¶ 21, 23, but Encompass Indemnity's records indicate Mr. Palmer's first notice of a water overflow on May 31. *Memorandum in Support of Motion to Dismiss*, dkt. 8, at 2 n. 3. For its sole opposition to dismissal, Bank relies on Encompass Indemnity's reservation of rights letter, see n. 1, and asserts that "[t]he Palmers' discovery of mold on May 31, 2010, indicates that the water damage actually occurred prior to the foreclosure on May 27, 2010. The Encompass Defendants lack any evidence to support a contrary conclusion." Response at 2; *id.* at 7.

---

[2]The *Motion to Dismiss*, dkt. 7, 7-1, noted Encompass Indemnity's reservation of rights, shown by its attached letter. The reservation is not integral to the *Motion to Dismiss*. *Trimble Navigation*, 484 F.3d at 705. It is irrelevant to the *Motion to Dismiss Encompass Insurance*, dkt. 10.

Bank's post-*Complaint* assertion, *id.*, is not at issue. *Giarratano*, 521 F.3d at 302; *Twombly*, 550 U.S. at 555; *Giarratano*, 521 F.3d at 302; *Trimble Navigation*, 484 F.3d at 705; see n. 1. The *Complaint* alleged no fact that could raise Bank's alleged right to Policy coverage """above the speculative level.""" *Lormand*, 565 F.3d at 232.

Bank cannot recover under the Policy. *Id.*; *Twombly*, 550 U.S. at 555; *Giarratano*, 521 F.3d at 302; *Trimble Navigation*, 484 F.3d at 705; *Complaint* Counts I, III, IV. It cannot recover under *Hayseeds* or the UTPA. *Complaint* Counts I, II; *Hawkins v. Ford Motor Co.*, 566 S.E.2d 624, 629 (W. Va. 2002) (citation omitted) ("absent a contractual obligation to pay a claim, no bad faith cause of action exists, either at common law or by statute."). Defendants ask the Court to grant the *Motion to Dismiss*, dkt. 7, and dismiss this action, with prejudice.

B. Bank states no claim against Encompass Insurance Company.

Encompass Insurance Company's *Motion to Dismiss Encompass Insurance*, dkt. 10, addresses a procedural issue. Bank named "Encompass Insurance" as a Defendant, but no such entity exists. "Encompass Insurance" is a trade name used by Encompass Indemnity on stationery and other materials. Encompass Insurance Company is a separate insurer. See *Memorandum in Support of Motion to Dismiss Encompass Insurance*, dkt. 11.

From its attachment to its *Complaint*, Bank knew that it made coverage-related claims only against Encompass Indemnity and Grossman, as Encompass Indemnity's claim adjuster. *Complaint*, Exh. A, Policy Declarations; *Trimble Navigation*, 484 F.3d at 705. Indeed, Bank admits that it

> sued Encompass Insurance, as that was the name of the company on Michelle Grossman's business card (see Exhibit A). Defendant has failed to come forward with any evidence to demonstrate that

> Encompass Insurance is not a proper party in interest. To the extent that employees of Encompass Insurance Company also adjust Encompass Indemnity's insurance claims, or receive paychecks from Encompass Insurance, said company may also be liable to the Plaintiff for its employees' violations of the UTPA.

Response at 3.

Bank's misunderstanding with respect to the trade name used by Encompass Indemnity, *id.*, does not give Bank a right to sue a separate insurer with no connection to Bank's claims. Where Bank has no claim against Grossman, see A above, Bank's post-*Complaint* concern about her employment, Response at 3, is irrelevant. The *Complaint* alleged no fact that could raise a claim against Encompass Insurance Company, much less any fact that could raise such a claim """above the speculative level.""" *Lormand*, 565 F.3d at 232.

Bank cannot recover from Encompass Insurance Company. *Id.*; *Twombly*, 550 U.S. at 555; *Giarratano*, 521 F.3d at 302; *Trimble Navigation*, 484 F.3d at 705. Defendants ask the Court to grant the *Motion to Dismiss Encompass Insurance*, dkt. 10, and dismiss this action, with prejudice.

CONCLUSION

As explained above and in the *Motion to Dismiss*, dkt. 7, and the *Motion to Dismiss Encompass Insurance*, dkt. 10, the *Complaint* of Plaintiff, Bank of Charles Town, states no claim on which relief may be granted. Defendants ask the Court to grant both dismissal motions and dismiss this action, with prejudice.

ENCOMPASS INSURANCE COMPANY, improperly named as Encompass Insurance, ENCOMPASS INDEMNITY COMPANY, and MICHELE GROSSMAN, By counsel,

/s/ *Ellen R. Archibald*

Brent K. Kesner (WVSB #2022)
Tanya M. Kesner (WVSB #5162)
Ellen R. Archibald (WVSB #5183)
Kesner, Kesner & Bramble, PLLC
112 Capitol Street
P. O. Box 2587
Charleston, WV 25329
Phone: (304) 345-5200
Fax: (304) 345-5265
Counsel for Defendants

E. Kay Fuller (WVSB #5594)
Martin & Seibert, LC
1453 Winchester Ave.
P. O. Box 1286
Martinsburg, WV 25402-1286
Counsel for Defendants on Plaintiff's Extracontractual Claims

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT MARTINSBURG

BANK OF CHARLES TOWN,

Plaintiff,

v.

CIVIL ACTION NO. 3:10-CV-00102-JPB
(Removed from the Circuit Court of Jefferson County, No. 10-C-312)

ENCOMPASS INSURANCE,
ENCOMPASS INDEMNITY COMPANY,
MICHELLE GROSSMAN,
JOHN WILSON, AND JOHN OR JANE DOE,

Defendants.

CERTIFICATE OF SERVICE

I, Ellen R. Archibald, counsel for Encompass Insurance Company and Encompass Indemnity Company, do hereby certify that on the **8th day of November, 2010**, I electronically filed the foregoing **REPLY TO PLAINTIFF'S RESPONSE TO TWO DISMISSAL MOTIONS** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Stephen G. Skinner, Esq.
Nichols & Skinner, LC
P.O. Box 487
Charles Town, WV 25414
Counsel for Plaintiff

E. Kay Fuller
Martin & Seibert, LC
1453 Winchester Ave.
P. O. Box 1286
Martinsburg, WV 25402-1286
Counsel for Defendants on Plaintiff's Extra Contractual Claims

/s/ *Ellen R. Archibald*
Brent K. Kesner (WVSB #2022)
Ellen R. Archibald (WVSB #5183)
Kesner, Kesner & Bramble, PLLC
112 Capitol Street
P. O. Box 2587
Charleston, WV 25329
Phone: (304) 345-5200
Fax: (304) 345-5265